In my view assessment of the two letters (P2 and P3) is material in the determination of the truth or otherwise of the version of the respondent and the co-respondent. According to the co-respondent both the letters (P2 and P3) were written by him under duress. The contents of the two letters were he said as dictated to him by the petitioner in a shop in Bagan Serai. There is however a number of inconsistencies in this. Firstly, the letters (P2 and P3) were written on different types of paper and this can clearly be seen. Secondly, it would appear also to be written with different ink. Thirdly, if both were written at the same time there is however evidence that letter (P3) was posted in an envelope bearing postmark "Bagan Serai" whereas there is evidence that P2 was delivered in person to petitioner by PW3. Finally, the content of P3 itself would indicate that it was from a person who was concerned with the happiness of the respondent ("Say nothing to her which might bring tears from her eyes.") whereas it was already established that by December 10, 1971, the date of the letter, petitioner had already taken the respondent back to her father's house and there was certainly a feeling of hostility by the petitioner towards the respondent. Counsel for the petitioner went further by suggesting that the co-respondent who on his own testimony admitted to be fond of quotations from learned writers must have written these letters himself.

It is the contention of the respondent and the co-respondent that PW2, PW3 and PW4 are not witnesses of truth. However, apart from the allegation by the respondent that they belong to one "gang" with the petitioner I find nothing in their evidence which could entitle me to doubt or disbelieve them. The evidence of PW4 (who was a fellow lodger with the co-respondent) discloses nothing on which I can base any reasonable suspicion that he was not an independent witness.

It is true that none of the evidence adduced on behalf of the petitioner was direct evidence of adultery between the respondent and the co-respondent but it is also true that in a case of this nature it is indeed rare that the parties committing adultery are caught in the act and therefore in almost all cases the court will have to depend on circumstantial evidence from which it can safely infer that adultery must have been committed. From the petitioner's own evidence it would be fair to conclude that he was free from any feeling of suspicion towards the respondent until December 6, 1971. But it appears that his suspicion was aroused because of the circumstances in which he found the respondent with the co-respondent that night. I agree that on the petitioner's testimony alone no conclusion can safely be arrived at that an adulterous association existed at that time between the respondent and the co-respondent. But when the whole evidence adduced on behalf of the petitioner and the other witnesses especially PW4 is considered the picture changes. It is the contention of the counsel for the respondent and the co-respondent that the evidence on the incriminating circumstances adduced by PW4 were adduced only as an afterthought for nothing of that kind was said by this witness in the earlier hearing before the late Mr. Justice N. Sharma. But the reply by this witness, I think, clears the position in that he said he did not say all this before because he was not asked by his counsel then (who was a different counsel from the counsel for the petitioner at present). PW4 is a simple person not really literate and probably never came to give evidence in court before. I do not think it is fair to expect him to narrate his experience pertaining to any particular matter without being asked by his counsel first. For this reason I am not entitled in my view to conclude that PW4 has concocted the evidence.

In this case the co-respondent was a lodger staying in the same house with the respondent. The opportunity to commit adultery if the parties were so inclined was always present whenever the petitioner was not around. In my view the whole evidence adduced on behalf of the petitioner has sufficiently established by necessary inference that adultery must have been committed.

For these reasons I order that decree nisi be granted to be made absolute in three months from the date hereof. On the question of custody it has been disclosed that all the children of the marriage except one child, the eldest, aged 15, are already with the petitioner. It is established that the petitioner is the headmaster of a school earning a substantial monthly salary and who has also testified that he has taken various steps towards the welfare of the children including the taking of education insurance. It is however disclosed in her own evidence that the respondent is unemployed and that she is living with her father who according to her is also unemployed. I therefore order that the custody of the children already with the petitioner shall remain with the petitioner with unrestricted right of access by the respondent. As it appears that the eldest child has been with the respondent all along, the custody of the eldest child shall continue to remain with the respondent. Either party shall be at liberty to apply to vary the order as to custody. Costs of this petition shall be borne by the respondent and the co-respondent.

Order accordingly.

Solicitors: *Cheang Lee & Ong; S.A. Lingam.*

EMPLOYEES PROVIDENT FUND BOARD v. EMPLOYEES PROVIDENT FUND BOARD STAFF UNION

[O.C.J. (Chang Min Tat J.) March 5, 1976]
[Kuala Lumpur — Originating Motion No. 59 of 1975]

Practice and Procedure — Application for certiorari to quash decision of Industrial Court — Whether Industrial Court must be served — Whether Attorney-General must be served — Industrial Relations Act, 1967, ss. 21(2) and 53A(1).

In this application for *certiorari* to quash the decision of the Industrial Court, a preliminary point was made that the Attorney-General and the Industrial Court must be served.

Held: (1) in the circumstances of this case the Attorney-General need not be served;

(2) the Industrial Court should be served with a copy of the application.

Case referred to:-

(1) *Industrial Arbitration Tribunal* v. *Cargo Handling Corp. Ltd.* [1967] 2 M.L.J. 98 F.C.

ORIGINATING MOTION.

Andrew Saw (*H.Y. Too* with him) for the applicants.

J.J. Puthucheary for the respondents.

K.L. Rekhraj, amicus curiae.

Chang Min Tat J.: At the application for an order of certiorari, Mr. Puthucheary, counsel for the respondents, made a preliminary point. He contended that both the Attorney-General and the Industrial Court whose order was sought to be quashed, must be served.

He grounded his submission in respect of the Attorney-General on section 53A of the Industrial Relations Act. Section 53A(1) reads:

"The court may and shall, if so directed by the Attorney-General, refer a question law arising in any proceeding before it to the Attorney-General for his opinion."

If I may say so, without disrespect, the submission of Mr. Puthucheary on this particular point was a very tentative one and he did not press very hard for it. But he did say that since the Attorney-General was the "Director" of the Industrial Court and could give his opinion on any question of law arising in any proceedings in the Industrial Court either on reference to him by the court or on his own motion he should be served so that his views on the very serious allegations against the Industrial Court should be available to me. Mr. Saw for the applicants argued against it. He suggested that if the practice in England was to be followed the Attorney-General as *parens patriae* should only be brought in, in matters concerning infants, idiots and lunatics and public charities and he also relied on *de Smith's* Judicial Review of Administrative Actions (3rd Edition) at p. 455 that in proceedings for declaratory orders, apart from statute, the Attorney-General ought only to be joined as a defendant in matters which involved the Crown or raised great national concern.

For myself, I take the view that section 53A provides merely for the advice of the Attorney-General to be given to the Industrial Court but does not say, in any way, that the opinion of the Attorney-General shall bind my court as it does the Industrial Court. I must reject my suggestion that the High Court is to conduct its proceedings in accordance with the opinion or direction of the Attorney-General.

At this juncture, I must refer to a letter which was directed by the Registrar of the Industrial Court to my private secretary enclosing certain letters between the President of the Industrial Court and the Attorney-General for my reading. I very much doubt the propriety of sending such correspondence to me. But this stricture apart, it would appear from the correspondence that the Attorney-General saw no reason to intervene in the proceedings in the High Court.

I reject the suggestion that the Attorney-General should be served.

In so far as the Industrial Court is concerned, the practice is covered by the practice in England as contained in Order 59 rule 5(2) of the 1957 Rules of the Supreme Court. Rule 5 provides that when leave has been granted to apply for an order, *inter alia*, of certiorari, the application should be made by notice of motion. Sub-rule (2) provides that the Notice of Summons shall be served on "all persons directly affected." Mr. Saw thought that the Industrial Court has no corporate personality and could not sue or be sued (see *Industrial Arbitration Tribunal* v. *Cargo Handling Corp. Ltd.*).[1] It could consequently not be served. Mr. Rekhraj, whom I heard as *amicus curiae* since he was concerned with another similar application in which Mr. Puthucheary also proposed to take the same objections, suggested that under section 21 subsection (2) of the Industrial Relations Act no member of the court should be compelled by any court of law to appear as a witness or party and he contended, therefore that the Industrial Court could not be served. Section 21(2) of the Industrial Relations Act however refers to the immunity given to members of the Industrial Court but, with respect, I am of the view that this is not a question of service of the court in a matter in which the immunity given to members of the court is being violated. Service does not mean compulsion to appear before any court of law as a witness or party. I also am of the opinion that the lack of personality in the Industrial Court is not of any materiality in the matter of service.

The 1962 *Annual Practice* at p. 1731 on Order 59 rule 5(2) under "persons directly affected" has this to say:

"In addition to the court whose proceedings are in question, the notice of motion or summons should also bear the name, as respondent, of the other party to the proceedings before it."

I think it is clear that giving the words their ordinary grammatical meaning the words "persons directly affected" must mean and include the Industrial Court in this case. All that is required under this rule is to serve the notice or the summons applying for certiorari on the Industrial Court. What the Industrial Court proposes to do after that in respect of the notice is a matter for its own decision. I think the answer is contained in what Mr. Saw himself submitted that if the Industrial Court had wanted to participate it could file an affidavit. Mr. Saw thought that the Industrial Court had time enough for it but nevertheless I think that the summons should be served on it and it be given a little further time. If the Industrial Court chooses to make such an affidavit it would then form part of the record.

I therefore consider that Mr. Puthucheary's contention in respect of the Industrial Court is well-founded and I shall adjourn further hearing of the matter to a date to be fixed after service of the summons on the Industrial Court.

Order accordingly.

Solicitors: *Shook Lin & Bok; Skrine & Co.; Rekhraj & Co.*